

general prohibition of Section 628(b).

That exclusive contracts not involving cable operators were not seen as unfair practices by the members of Congress is evident in the remarks of Mr. Tauzin in the floor debate over this issue:

There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so... our amendment says that exclusive programming that is not designed to kill the competition is still permitted.

138 CONG. REC. 6534 daily ed. July 23, 1992) (statement of Mr. Tauzin). Thus, Congress prohibited the exclusive contracts that were designed to kill the competition, i.e., the contracts by which cable programmers agreed with cable operators to lock out non-cable MVPD's in areas unserved by cable, and presumptively disfavored them in areas served by cable. No other exclusive contracts were prohibited or even addressed in the Cable Act.

That exclusive contracts were recognized by members of Congress as fostering competition and diversity and thus were not themselves unfair practices is also clear from the remarks of Mr. Dingell in the debate on the floor:

A lot has been said here today about exclusive distribution contracts. If this term is used in a pejorative fashion, it sounds most pernicious.

But exclusive distribution contracts are a fact of life in the video distribution business, and have been for more than 40 years. They are not evil. The CBS Television Network has exclusive distribution contracts - with the more than 200 CBS affiliates around the country. Likewise with NBC, ABC, and Fox.

Program syndicators enter into exclusive distribution contracts as well. Only one station per market can show programs like "Wheel of Fortune," or "Cosby" reruns, or any of the other shows that are syndicated.

Sports leagues do it too. ABC has an exclusive arrangement with the

NFL to show "Monday Night Football."

Not only are exclusive distribution contracts a fact of life in the video marketplace. Exclusivity provides the mechanism to achieve diversity - an important policy goal that benefits the public. With access to more choices, the public has an increased opportunity to select what they want to see on television. Diversity helps to preserve our democracy, and is essential to enlightened self-governance.

138 CONG. REC. 6542 (daily ed. July 23, 1992) (statement of Mr. Dingell).

DirecTv has not shown how the contracts that it seeks to prohibit are "unfair practices" or how they differ from exclusive programming contracts that are standard in the video industry. Moreover, DirecTv has not explained why Congress would specifically address exclusive contracts in Sections 628(c)(2)(C) and (D) if exclusive contracts were already prohibited by Sections 628(b) and 628(c)(2)(B). If DirecTv's interpretation of the Act were correct and non-cable exclusives were prohibited by Sections 628(b) and/or 628(c)(2)(B), it would lead to the absurd result that only cable operators would be able to enter into exclusive programming contracts with vertically integrated cable programmers! Clearly Sections 628(b) and 628(c)(2)(B) do not prohibit exclusive contracts between non-cable MVPDs and vertically integrated cable programmers and do not require the Commission to amend its rules as requested by DirecTv.

B. There Is No Need, No Public Interest Justification, and No Public Policy Reason to Prohibit or Presumptively Disfavor Exclusive Contracts Between Vertically Integrated Cable Programmers and Non-Cable MVPDs

As USSB has already demonstrated in this proceeding, the public interest in exclusivity in the sale of programming has been recognized by Congress and the Commission. Notwithstanding this recognition, certain exclusive program contracts

were expressly prohibited by Congress in the Cable Act and by the Commission in this proceeding for certain very specific reasons that do not apply to non-cable MVPDs. In initially opposing reconsideration of the 1st Report, DirecTv eloquently explained the purpose behind Section 628(c)(2)(C) as follows:

"Congress passed Section 628 in large part because it was concerned with the overall level of vertical integration between cable operators and video programming suppliers. One of Congress's concerns was that vertically integrated programmers, who control most of the desirable programming services, possess industry-wide incentives to discriminate against emerging alternative MVPDs and to favor cable providers uniformly as a distribution technology."

DirecTv Opposition at 9. The concern that prompted Congress to enact Section 628, as DirecTv has itself stated, is that the vertically integrated cable industry was favoring itself when it entered into exclusive contracts with cable operators. That concern is not present when cable programmers enter into contracts with MVPDs other than cable operators.

Contracts between DBS operators and vertically integrated cable programmers do not present any of the ills sought to be prevented in the Cable Act. They do not result in no service to the consumer. Indeed, as USSB has demonstrated, they ensure program diversity and maximum utilization of the spectrum. They do not serve any anticompetitive purpose. Indeed, they promote and ensure competition. They do not deny programming to services that compete with cable. Indeed, they are contracts to provide programming to services that compete with cable. They do not allow the cable industry to discriminate against emerging technologies in favor of cable providers. Contracts guaranteeing one MVPD exclusivity vis-a-vis its competitors within the same service and serving the same geographic area (which DirecTv contends should be

prohibited) are procompetitive, promote program diversity, and are the most efficient use of the spectrum.

In the DBS service, such contracts are absolutely necessary for USSB if there is to be effective competition between the two high power DBS service providers. Since DirecTv will always control far more channels than USSB, USSB must be able to differentiate its programming from that of DirecTv. Otherwise, DirecTv could package the programming it offers²⁴ so that the programming that DirecTv and USSB offer in common would be offered by DirecTv at little or no charge, secure in the knowledge that the consumer would have only one source (and thus would pay any price) for the balance of DirecTv's programming services that are unique to DirecTv.

The U.S. Department of Justice's Antitrust Division obviously understands that competition within DBS rests upon USSB's ability to differentiate its programming. In responding to DirecTv's/NRTC's submission in the U.S. v. Primestar Partners proceeding, in which DirecTv and NRTC raised objections to the proposed Final Judgments because they permitted grants of exclusivity in DBS at the 101° WL orbital location, the Justice Department (for the Government) noted:

The effects of DirecTv's proposal on competition among DBS providers is not entirely clear. DirecTv will ultimately be in a position to sell approximately 150 channels of programming, as opposed to approximately 30 for USSB. If DirecTv were able to offer all of the attractive programming that was available to USSB, competition between DirecTv and USSB might be impaired. DirecTv appears to understand the need for differentiated programming between itself and USSB as it has, the Department understands, obtained certain exclusive programming rights vis-a-vis USSB.

²⁴DirecTv is currently offering the premium services of The Disney Channel (two channels) and Encore (seven channels) as part of its basic package.

See Comments of the Department of Justice published in the Federal Register in connection with the proposed Final Judgment in United States v. Primestar Partners, L.P., et al., 58 Fed. Reg. 60,672, 60,673-76 (November 17, 1993) ("DOJ Comments").

There is no need for the Commission to revise and expand its rules. The rules adopted by the Commission do exactly what the Act required and what the Conference Report described. What DirecTv wants is for the rules and the Cable Act to go further than they do. Yet no MVPD in any service other than high power DBS sought reconsideration of the 1st Report's adoption of Section 76.1002(c)(1) of the rules; and, as demonstrated herein, DirecTv itself initially approved of the program access rules and called upon the Commission to affirm the 1st Report. NRTC is not itself a DBS licensee or permittee but is simply a party to a marketing agreement with DirecTv, which (as demonstrated infra) has stated publicly that it is pleased with its programming.

There is no public interest reason to amend the new rules at this time. No consumer will benefit and no public interest concern will be fostered by amending the rules as DirecTv and NRTC propose. On the contrary, the public interest goals of robust competition, maximum diversity of programming, and efficient use of the spectrum will all suffer by revision of the rules as NRTC and DirecTv request.

DirecTv and USSB serve the exact same market. Their programming is carried on the same satellite, which they jointly own. The satellite's footprint covers the entire continental United States (the 48 contiguous states). The programming of both DirecTv and USSB is delivered to the consumer over the same receiver. The consumer uses the same 18-inch satellite dish, the same dedicated digital receiver, the same

interactive remote control, the same on-screen menu system, the same program guide, the same system functionality, and the same access card to receive USSB's and DirecTv's programming together. All of these components comprise a single system, which USSB and DirecTv share completely. NRTC's relationship with DirecTv does not alter any of the above. There is no reason for the Commission to amend its rules to require USSB's programming to be carried by DirecTv as well. Every consumer in the 48 contiguous United States (hereinafter referred to as Continental U.S.) will have access to all of DirecTv's programming and all of USSB's programming. The consumer is best served by the existing rules.

III. **DIRECTV's EX PARTE RESPONSE SHOULD BE STRICKEN AS AN UNTIMELY PETITION FOR RECONSIDERATION**

In its Ex Parte Response, for the very first time, DirecTv urges the Commission to "clarify unequivocally" that "all exclusive contracts between vertically integrated programmers and non-cable MVPDs are presumptively disfavored -- and in the case of unserved areas, prohibited altogether -- in light of the purpose and legislative scheme of the 1992 Cable Act's program access provisions." This request, as noted above, goes far beyond what even NRTC sought in its Petition for Reconsideration and essentially constitutes an untimely Petition for Reconsideration that must be stricken.

As noted above, NRTC's Petition for Reconsideration, filed on June 10, 1993, the date by which all petitions for reconsideration were due, was limited to seeking revision of Section 76.1002(c)(1), which governs areas **unserved by cable**. DirecTv in its Ex Parte Response for the first time asks the Commission for a ruling on contracts **in areas served by cable**, which are regulated by Section 76.1002(c)(2), a provision as to which no party requested reconsideration. To the extent that DirecTv's Ex Parte

Response belatedly now seeks reconsideration of Section 76.1002(c)(2), it must be stricken and returned to DirecTv without consideration.

Over the past year, DirecTv's position with respect to the Commission's program access rules has changed course several times. As noted above, DirecTv did not itself seek reconsideration of any aspect of the 1st Report; and DirecTv opposed four other parties that sought reconsideration. In opposing reconsideration, DirecTv stated its belief "that the Commission has **faithfully followed the intent of Congress** in promulgating its program access rules"²⁵ and urged the Commission "to reaffirm its program access rules." See Opposition of DirecTv, supra at 1-2, 15 (filed in MM Docket 92-265 on July 14, 1993) (emphasis added).

Just two weeks later, in this same proceeding, DirecTv made its first "about face" turn. In its "Reply of DirecTv, Inc." filed July 28, 1993, DirecTv supported NRTC's Petition for Reconsideration. DirecTv argued, however, that

"The Commission should confine its Reconsideration **solely to the scope of Section 628(c)(2)(c) and avoid broad policy pronouncements** concerning the propriety of exclusive contracts between programming vendors and non-cable MVPDs."

Reply of DirecTv at 2 (emphasis added).

Now, almost one year later, DirecTv has changed its mind again. This time, long after petitions for reconsideration were filed, DirecTv maintains that the Commission

²⁵It is clear in DirecTv's July 14, 1993 filing opposing reconsideration of the program access rules that (1) DirecTv viewed Section 628 of the Communications Act as prohibiting exclusive contracts between **cable operators** and vertically integrated cable programmers (Opposition at 9); and (2) DirecTv believed that its possible remedy against a cable programmer that sold to USSB but not DirecTv was under the non-price discrimination provisions of the rules -- not that such contracts were prohibited because they were exclusive (Opposition at 12).

should issue a broad policy pronouncement prohibiting all exclusive contracts between cable programmers and any MVPD in noncabled areas and presumptively disfavoring such contracts in cabled areas, thereby contradicting its earlier statement and seeking a complete revision of Section 76.1002(c)(2). DirecTv thus now seeks reconsideration of both Sections 76.1002(c)(1) and 76.1002(c)(2).

It is apparent that DirecTv's position on this issue is not based on any conviction or concern as to what the Cable Act prohibits or what Congress intended. DirecTv's action is purely anticompetitive. DirecTv's grossly untimely request for reconsideration of Section 76.1002(c)(2), in complete disregard of the Commission's procedural rules, must be rejected and its Ex Parte Response stricken.

IV. IT IS DIRECTV -- NOT USSB -- THAT HAS FILED AN EX PARTE PRESENTATION REplete WITH MISSTATEMENTS AND IRRELEVANCIES

Throughout its Ex Parte Response, DirecTv deliberately grossly distorts and misstates USSB's position and that of the "cable industry" in this proceeding. For example, DirecTv's Ex Parte Response includes phrases and statements such as:

DIRECTV nevertheless has been apprehensive that cable interests would opportunistically attempt to open up another "front" in their continuing assault on the program access protections of the 1992 Cable Act ... in the same way they sought to undercut the program access rules in the recent Primestar Partners case in the Southern District of New York.

Ex Parte Response at 3-4. DirecTv's only authority for its assertion that "cable interests ... sought to undercut the program access rules in the recent Primestar Partners case" is its own filing (in which it was joined by its marketer/distributor NRTC) in that proceeding, which similarly contained no evidence and no support for such allegations. DirecTv's and NRTC's arguments were of course opposed by the U.S. Department of Justice and the Attorneys General of 45 states and the District of

Columbia and rejected by Judge Sprizzo in that proceeding. Thus, DirecTv now contends that the FCC should "accord no weight to any statements in the Primestar proceeding" and refers to the Final Judgment in that proceeding as a "cable-friendly regime negotiated by the cable industry with the state attorneys general." Ex Parte Response at 16. DirecTv also calls the Comments of the U.S. Justice Department, which rejected DirecTv's and NRTC's arguments, "irrelevant."

Similarly, DirecTv's Ex Parte Response repeatedly refers to the purported activities of cable interests in connection with this proceeding,²⁶ however, no support is offered by DirecTv for any of its false and/or exaggerated claims. The sole basis for DirecTv's absurd and reckless allegations is the fact that Time Warner and Viacom programming subsidiaries signed contracts with USSB instead of with DirecTv.

DirecTv has cable programming from most if not all of the other vertically integrated cable programmers. See Exhibit 2.

To DirecTv, everything boils down to whether you agree with DirecTv or not:

- When the U.S. Department of Justice disagrees with DirecTv, DirecTv says that its comments are "irrelevant."
- When the attorneys general of **45 states and the District of Columbia** disagree with DirecTv, DirecTv charges that they are "cable friendly" (despite the fact that their antitrust investigation and proceeding against the Primestar Partners was commenced long before passage of the Cable Act).
- When Judge Sprizzo approves the Final Judgment in the Primestar Partners case over DirecTv's objections, DirecTv says that his statements

²⁶E.g., "it has become increasingly evident that the FCC is being goaded by cable interests" (Ex Parte Response at 4); "[i]f the cable industry is successful here in convincing the Commission" (Id. at 5); "then vertically integrated programmers can continue to strategically 'carve up' DBS..." (id.); "it appears that USSB has chosen to 'carry the water' for the cable industry on this issue" (id. at 6).

should be "accorded no weight."

- When Time Warner and Viacom negotiate with both USSB and DirecTv but choose to sign contracts with USSB, DirecTv screams "discrimination", "cable industry" collaboration, and "unlawful refusals to deal."

Obviously DirecTv and NRTC know there is no cable conspiracy or strategy.

The reckless allegations of DirecTv and NRTC are simply their attempt to distinguish their own exclusive contracts and arrangements from those of USSB and to arouse Congressional and Commission interest in their filings in this proceeding.²⁷

DirecTv's charges that USSB's filing is "replete with misstatements" and that much of USSB's filing is "misleading, or flatly incorrect" are more serious and more recklessly made, since **DirecTv's filing fails to identify any statement by USSB that DirecTv finds to be a misstatement.** It appears that DirecTv would have the Commission just accept DirecTv's word that there are misstatements.

²⁷Moreover, those allegations are belied by other statements of NRTC to the Commission in CS Docket 94-48. For example, in its "Comments of the National Rural Telecommunications Cooperative," at pages 12-13 (emphasis added), filed June 29, 1994, in CS Docket 94-48, NRTC stated

In particular, **NRTC applauds the following vertically-integrated C-Band programmers** for their timely implementation of revised C-Band pricing structures for NRTC:

....
VH-1
Nickelodeon, and
MTV

NRTC's experience with these C-Band programmers suggests that **they have complied with the Commission's programs access requirements.**

VH-1, Nickelodeon, and MTV are all services of Viacom! It is difficult to reconcile DirecTv's and NRTC's allegations against Viacom in this proceeding with NRTC's applause for Viacom in CS Docket 94-48.

USSB has no difficulty finding misstatements, misleading statements, and flatly incorrect statements in DirecTv's filing. Most outrageous is the charge that "USSB has lobbied vigorously²⁸ - before ... a federal court." Ex Parte Response at 8. Given DirecTv's own conduct in and during the Primestar Partners proceeding, DirecTv's Ex Parte Response is shameful.

There is no way anyone could honestly conclude that USSB has vigorously lobbied before a federal court. **USSB sought to file** comments on the proposed Final Judgment in the Primestar Partners proceeding in federal court **only after it learned that DirecTv and NRTC had already injected themselves into that proceeding** to use it as a forum to oppose USSB's programming arrangements with Viacom and Time Warner, which were two of the defendants in the proceeding. Unlike DirecTv, whose counsel engaged in a vigorous debate with the presiding judge (which debate spanned 14 pages of transcript),²⁹ USSB did not even participate in the oral hearing on September 3, 1993 in the Primestar proceeding (other than to appear). USSB filed a Memorandum of Law of Amicus Curiae United States Satellite Broadcasting Company, Inc.; but no activity of USSB or its representatives in the Primestar Partners case could by any stretch of the imagination be deemed "lobbying."

²⁸USSB has not engaged in vigorous or frenetic lobbying -- particularly when USSB's efforts are compared to those of NRTC and DirecTv on Capitol Hill and at the FCC. Prior to DirecTv's filing of its Ex Parte Response, USSB's lobbying activities before Congress were minimal and were primarily responsive to DirecTv's and NRTC's lobbying activities.

²⁹Those 14 pages were included in an exhibit to USSB's "Ex Parte Response to Ex Parte Presentation by the National Rural Telecommunications Cooperative," filed January 24, 1994. Both NRTC and DirecTv have complained about the length of USSB's filing, but exhibits were necessary to demonstrate that allegations and statements made by NRTC were false and/or misleading.

In stark contrast, DirecTv not only was a more vigorous participant in the Primestar Partners case in court, it was also vigorous behind the scenes at the FCC, as Commission records reflect, meeting with Commission personnel, giving them information to facilitate their participation in the federal court proceeding, and apparently convincing them to become involved in the Primestar Partners proceeding. DirecTv also provided the Commission with its brief (and others) opposing the proposed Final Judgment to assist the Commission in preparing a filing.³⁰

Another incorrect allegation that DirecTv and NRTC have both repeatedly raised is the charge that USSB's contracts with the programming services of Viacom and Time Warner "virtually [ensure] that consumers will pay more for a full complement of programming when purchasing service from competing DBS providers--by being forced to piece together program offerings from services offered by multiple DBS operators--than when purchasing from a single cable operator offering the same programming in an integrated package." Ex Parte Response at 5, 11. Although DirecTv and NRTC have been making this (false) allegation for over a year, they have never offered any example or any comparison of actual rates to demonstrate or even suggest that there is any support for their assertion.

USSB's and DirecTv's program offerings, packages, and pricing are well known. USSB's DBS program prices and offerings are competitive with cable, as they were designed to be.³¹ Moreover, together USSB and DirecTv offer more cable program

³⁰No information about DirecTv's meetings and contacts with the staff has been placed into the record of MM Docket No. 92-265, as best USSB can determine.

³¹In fact, the promotional materials used by RCA to sell the DSS™ system, so that the consumer may receive the programming of DirecTv and USSB, include a

services than most, if not all, cable systems in the country. Furthermore, unlike most cable systems, which offer only one channel of each premium service (e.g., HBO, Showtime, and Cinemax), on DBS the consumer will have **five distinct channels of HBO** (HBO, HBO2, HBO3, HBO West, and HBO 2 West), **three distinct channels of Cinemax** (Cinemax, Cinemax 2, and Cinemax West), **two channels of The Disney Channel** (East and West), **seven distinct channels of Encore**, **two channels of The Movie Channel**, and **three channels of Showtime** (Showtime, Showtime 2, and Showtime West).³²

In an "Ex Parte Response of Viacom International Inc.," submitted July 14, 1994, Viacom compared the prices of 12 cable operators from across the country to the prices at which DirecTv and USSB will offer the same or comparable programming services and demonstrated that in each case a cable subscriber would pay well in excess of what a DBS subscriber would pay. In any comparison of the programming offered by USSB and DirecTv over the DSS™ system to the programming offered on cable, the

brochure (a copy of which is included hereto as Exhibit 4) that invites the consumer to "use this handy comparison chart to assist in a line-by-line comparison with your cable programming and pricing." Obviously RCA believes that the consumer will conclude that DBS offers a better value than cable.

³²By comparison, the Media General cable system in Fairfax County, Virginia, which is one of the largest, if not the largest (by number of channels of programming) systems in the country, does offer three channels of HBO and two channels each of Cinemax and Showtime; but Media General charges subscribers higher prices for fewer channels than does USSB.

Fairfax County's cable system does not offer the following features that the consumer will be able to obtain from USSB and DirecTv: ENCORE (up to seven theme channels); more than 40 pay-per-view movie channels (Fairfax County has eight); two channels of The Disney Channel and two channels of The Movie Channel (Fairfax County has only one of each); and FLIX.

DBS service offered by USSB and DirecTv is impressive and certainly competitive to cable.³³ See Exhibit 2 hereto.

Notwithstanding their own vigorous and relentless efforts at the Commission and on the Hill, in which DirecTv and NRTC charge that the cable industry is carving up DBS and leaving "hobbled" DBS competitors, officials of both DirecTv and NRTC have publicly boasted that they are perfectly pleased with the programming they have. For example, **NRTC's CEO Bob Phillips** has reportedly stated:

"We will be offering the Personal Choice I and II packages, and the a la carte and pay-per-view offerings DirecTv has because we are DirecTv in our areas. We'll also have some special packages like 'Best of Cable' that we'll offer in our territories."

"We're operating in this market just like in the C-band market [with Rural TV], with the members free to price however they wish in their territory"....
"Based on what the members and affiliates have told me, because they're out there talking to the customers every day, **they're really thrilled with the lineup we have.**"

Reported in "DirecTv and the NRTC: Partners in Rural America," TVRO (June 1994) at 25 (emphasis added). See Exhibit 5 hereto. **DirecTv's President Eddy Hartenstein** has reportedly stated publicly:

"We're happy with the programming lineup we have.... I'm not sure it makes a whole lot of sense for us to carry HBO at the same time USSB is carrying HBO. We kind of like our programming lineup right now."

(id.). These public statements are difficult to reconcile with DirecTv's and NRTC's activities and representations at the Commission and on the Hill.

³³USSB understands that DirecTv's agreement with NRTC gives local NRTC franchisees the right to set their own rates. Obviously, USSB has no control over and cannot be responsible for the rates NRTC franchisees choose to set. USSB will sell its programming at nationally uniform prices and packages, so that all consumers will benefit from USSB's determination to offer rates that are competitive to cable.

Similarly irreconcilable are DirecTv's statements to the Commission about the obstacles to consumers of dealing with two service providers,³⁴ and DirecTv's own public praise of the seamless system.³⁵ DirecTv tells the FCC that: "customers will also be denied the economies of 'one-stop shopping' offered by cable operators and Primestar, and instead must deal with two customer service centers, two bills and potentially two sales staffs in order to obtain a complement of program offerings equivalent to that offered by cable providers." Ex Parte Response at 11. At the very same time, DirecTv's President Hartenstein tells the rest of the public (in an article in a magazine distributed to satellite dealers) that:

"We're all on the same side here".... "DirecTv and USSB are trying to create an industry. To create an industry, **it not only has to be priced and presented in a way that creates value, it needs to be presented to consumers in a very seamless way.**

"We fully plan to, when a consumer calls in to 1-800-DIRECTV and asks for HBO, tell him about all of our programming services and packages and do our best to convince him it creates value. But, at the end of the day, if he wants ours and still wants HBO, **we'll push a button and transfer him over to USSB to sign him up for HBO.** USSB has indicated they will do the same thing. **I can live with that,** provided we make it easy for the consumer."

See Exhibit 5 hereto. Thus, while DirecTv tells the FCC that USSB's demonstration to

³⁴It should be noted that consumers with C-Band satellite dishes have been dealing with multiple program providers and distributors for years. Many consumers with one telephone but different local and long distance telephone service providers are also accustomed to receiving two bills and dealing with two customer service centers. Thus, USSB feels confident that consumers should have no difficulty with two bills, two customer service centers, and two sales staffs for DBS, particularly when it results in a greater variety of programming choices.

³⁵DirecTv criticizes USSB's demonstration of the **seamless flexibility and ease** of the single DSS™ system, but it is clear that DirecTv itself believes that the seamless nature of the service is one of its strengths and an important feature for consumers.

the Commission that the DSS™ system is a seamless system "misses the point," DirecTv itself makes that very point when it communicates to parties other than the Commission and Congress!

Obviously, DirecTv and USSB will each work to make sure that their product is priced competitively, that the consumer recognizes the benefits and value of their services, and that the service is delivered to the consumer through the seamless DSS™ system. It is misleading of DirecTv to suggest otherwise to the Commission and to Congress.

V. THE COMMISSION SHOULD IGNORE THE RECENT FILINGS IN CS DOCKET 94-48 CONCERNING THE ISSUES HEREIN

In its recent Notice of Inquiry, FCC 94-119 (released May 19, 1994) ("NOI"), in CS Docket 94-48, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, the Commission sought information on the status of competition in the market for the delivery of video programming, seeking responses to very specific questions designed to elicit information that would assist the Commission in preparing a report to Congress required by the Cable Act. In the NOI at 5, ¶11, the Commission recognized that the outcomes of several other ongoing proceedings could affect competition in the multichannel video programming marketplace and specifically referenced MM Docket No. 92-265 as one such proceeding. The Commission emphasized that it did not "intend to consolidate any issues that may be pending in those proceedings within this inquiry." Notwithstanding this statement, DirecTv and NRTC devoted substantial portions of their comments (and NRTC devoted the majority of its reply comments) in CS Docket 94-48 to arguments and allegations they previously presented in this proceeding. Indeed, rather than responding to any of the

questions posed in the NOI in CS 94-48, NRTC devoted most of its comments and reply comments in that proceeding to its arguments in this proceeding.

In addition to filing comments and reply comments in CS Docket 94-48, NRTC also urged its members and affiliates throughout the country to send letters to the FCC and Capitol Hill on the topic of program access and USSB's exclusive programming agreements by the "deadline" of July 29, the date by which reply comments were due to be filed in CS Docket 94-48. As the Docket History for CS Docket 94-48 reflects, over 100 letters were filed at the Commission on or around July 29, 1994, by NRTC members, affiliates, and DBS franchisees, referring specifically to matters beyond the scope of that proceeding but at issue in MM 92-265.

A copy of the "NRTC Memorandum" that was sent to "NRTC DBS Participant General Managers" is attached hereto as Exhibit 6. Also attached hereto in Exhibit 7 are a few, representative examples of the letters sent to CS Docket 94-48 at the specific "urgent" request of NRTC. As the NRTC Memorandum reflects, NRTC's request to its members and affiliates included a summary of its filing, sample letters, and instructions for their "letter-writing campaign."

The attached samples of letters from the NRTC "letter writing campaign" contain several features in common, including the following statement:

"In contrast, none of the programming distribution contracts signed by DirecTV are exclusive in nature, and USSB is free to obtain distribution rights for any of the channels available on DirecTV."

See Exhibit 7. **DirecTv has acknowledged** in its Ex Parte Response in this proceeding **that it sought and obtained exclusive programming distribution**

contracts.³⁶ Thus, the statement quoted above is obviously false. This false statement, or statements nearly identical to it, appears in at least 37 of the NRTC "letter writing campaign" letters. Since this false statement appears in so many letters, it is obvious that it must have come from one or more of the sample letters sent by NRTC to its members and affiliates for the "letter writing campaign."

Another representation common to a substantial number of the letters (at least 37) is:

However, despite passage of the 1992 Cable Act, my company's ability to compete in our local marketplace is being hampered by our lack of access to programming owned by Time Warner and Viacom.

See Exhibit 7. This language, too, obviously comes from the "letter writing campaign" form letters, not from any real life experiences of the NRTC affiliates and cooperatives. The DSS™ receive system has only been available to consumers since June 17, 1994. Since that time, the demand for DSS™ units has far exceeded the supply. It would be surprising, given the short time that the service has been available and the limited supply of receive equipment, if any NRTC affiliate had at this time any real idea of how competitive its service will ultimately be in its marketplace. Moreover, as discussed infra at pages 38-39, the statements above are offered by persons and companies who were obviously not aware that they can offer USSB programming to their customers through USSB's open retail policy. All non-NRTC DSS™ retailers are participating in USSB's open retail program and offering USSB programming to all of their customers. The exact same opportunity is available to all NRTC affiliates under USSB's open retail

³⁶It should also be noted that DirecTv's marketing/distribution arrangement with NRTC gives NRTC and its affiliates the **exclusive right to distribute DirecTv's programming** in the territories that they purchased from DirecTv.

policy.

Additional false and misleading information was also apparently communicated to NRTC members and affiliates to incite them to action. For example, Interstate Satellite Services, Inc. (ISS) wrote to the Chairman of the FCC on July 20, 1994, in reference to CS 94-48 and NRTC's comments therein, concerning the inability of rural residents in eastern South Dakota to receive cable television or broadcast off-air signals. The letter states further that:

The have-nots cannot receive the Time Warner and Viacom programming, like HBO, Showtime, Cinemax, The Movie Channel, and other similar type programming because of the "exclusive" distribution arrangements that were made with United States Satellite Broadcasting Co., Inc. (USSB). It is unbelievable these rural households can finally have high quality TV programming delivered to their house at an affordable price and then they are excluded from many choices because of exclusivity. Can you imagine waiting 15-20 years for TV programming like their small town acquaintances have and then be denied full selectivity!

I have been told that none of the DirecTv programming contracts are exclusive contracts and they shouldn't be.

See Exhibit 8.

Obviously ISS believes that rural consumers will be denied programming as a result of USSB's contracts with the programming services of Time Warner and Viacom. That is simply not true. USSB's programming is available to every consumer, rural, urban, and suburban (in the 48 contiguous United States), who acquires a DSS™ receiver. In fact, USSB provides its entire programming package free for one month to every consumer who purchases a DSS™ receive system from whatever source.³⁷ It is

³⁷The consumer or the dealer only needs to advise USSB that the consumer purchased a DSS™ system.

apparent that false and/or misleading information was provided to NRTC members and affiliates in order to enlist their support of NRTC's improper filings in CS Docket 94-48.

Similarly, it appears from some of the letters that the authors have been provided with false information about the ownership of Primestar and the programming carried on Primestar. Several of the letters include references to Viacom as an owner of Primestar and indicate that Viacom's programs are available on Primestar, as NRTC incorrectly stated in its own comments in CS Docket 94-48. However, Viacom is not an owner of Primestar, and its programming is not available on Primestar.

Having reviewed the letters recently filed in CS Docket 94-48 as part of the "letter writing campaign," USSB has concluded that the authors may not be aware of USSB's open retail policy,³⁸ although it has been well publicized. USSB's open retail policy provides that any satellite or consumer electronics retailer who qualifies as a DSS™ dealer for RCA or other brands, abides by USSB's policies and procedures, and maintains USSB's standards of customer service excellence will be able to offer USSB's programming packages in conjunction with DSS™ equipment sales. NRTC affiliates, consumer electronics dealers, and home satellite retailers who wish to take advantage of USSB's open retail policy can call USSB's toll-free dealer hot line. USSB has widely publicized its open retail policy and its toll-free dealer hot line. It should be noted that **some NRTC affiliates have already been in contact with USSB and are participating in USSB's open retail program, which allows them to offer USSB programming (in addition to DirecTV programming) and receive commissions from**

³⁸ USSB's open retail policy has been set forth in previous filings in this proceeding.

USSB.

To ensure that NRTC affiliates and franchisees are aware of USSB's open retail policy, USSB has contacted the authors of the "letter writing campaign" letters, by mail, advising them that they can distribute USSB's programming. See Exhibit 9.

It is clear that the letters solicited by NRTC are not proper comments or reply comments in CS Docket 94-48. It is also clear that the letters were induced by providing false and misleading information to the authors of those letters. The letters, therefore, should be totally ignored by the Commission as beyond the scope of CS Docket 94-48 and as inaccurate and unreliable.

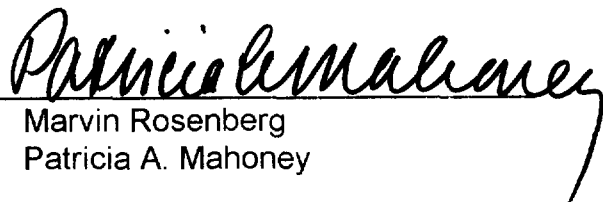
VI. CONCLUSION

As the foregoing demonstrates, DirecTv's Ex Parte Response is an untimely petition for reconsideration and should be stricken. It provides no support for the revision and expansion of Sections 76.1002(c)(1) and 76.1002(c)(2) that it seeks. For 2the reasons herein and in its previous submissions in this proceeding, the Commission should deny NRTC's petition for reconsideration of the 1st Report.

Respectfully submitted,

UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

By:


Marvin Rosenberg
Patricia A. Mahoney

Its Attorneys

FLETCHER, HEALD & HILDRETH
1300 N. 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

EXHIBIT 1

Congress of the United States
House of Representatives
Washington, DC 20515

August 24, 1994

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

We are aware of the letter sent to you on June 15, 1994 by several Members of Congress, addressing Section 19, the program access provision, of the Cable Act of 1992. We believe that letter fundamentally misstates the goal of Section 19, which was intended only to address exclusive practices by cable operators. Non-cable operations, such as direct broadcast satellite (DBS) are not covered by Section 19.

As the title of the Cable Act clearly indicates, the legislation specifically was designed to address the problems suffered by the public as a result of cable's monopolistic practices. Many of our constituents complained about cable operator's abuses of their power.

A key provision of the Act is Section 19, which addresses cable programming practices. It precludes cable operators from entering into exclusive contracts with vertically integrated cable programmers in areas not served by cable, if the FCC determines that such contracts are in the public interest. We submit, however, that a search of the entire Cable Act and its legislative history will confirm that only program contracts involving cable operators were intended to fall within the province of Section 19 and the Act as a whole.

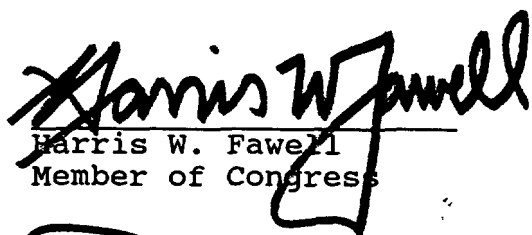
Moreover, a fundamental purpose intended to be served by Section 19 is the promotion of technologies that can compete with cable operations. In this regard, competitive exclusivity in DBS operations is essential if a non-cable operator with a small number of channels is to be able to compete with another operator offering more, but different channels. Denying competitive exclusivity could have the perverse effect of creating a monopoly within DBS by limiting an operator's ability to grow, compete with cable, and offer unique services to the customer.


We believe the Commission's initial conclusions on programming exclusivity -- that Section 19 applies only to cable operators -- were correct, and the rules adopted by the FCC thus properly implement Section 19. We understand the Attorneys General of 45 states and the District of Columbia, the U.S. Department of Justice, and Judge John Sprizzo, U.S. District Court, Southern District of New York, all agree that the Cable Act of 1992 does not prohibit exclusive contracts by DBS providers and programmers.

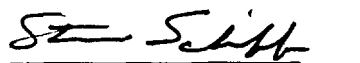
We have attached material which provides graphic illustration of the fact that the FCC's present rules will make extensive programming available to DBS customers.


We appreciate your consideration of our views.


Sincerely,



Harris W. Fawell
Member of Congress



Philip M. Crane
Member of Congress



Steven H. Schiff
Member of Congress


Carlos J. Moorhead
Member of Congress


Scott L. Klug
Member of Congress


Cardiss Collins
Member of Congress


Jack Fields
Member of Congress


J. Dennis Hastert
Member of Congress

DSS™

(Digital Satellite System)

DirecTv Programming

Basic Channels

A&E
Black Entertainment
Television
Cartoon Network
Country Music Television
CNN
CNN International
CNBC
Court TV
C-Span
C-Span 2
Discovery
E!
ESPN
Family Channel
Headline News
The Learning Channel
Much Music
SCI-Fi Channel
Shopping
Travel Channel
The Weather Channel
TBS-Superstation
The Nashville Network
Turner Classic Movies
TNT
USA Network

Premium Channels

The Disney Channel East/West
Encore
Encore 2/Love Stories
Encore 3/Western
Encore 4/Teen
Encore 5/Mystery
Encore 6/Action
Encore 7/True Stories & Drama
Playboy Channel

Pay-Per-View Movies

*Approximately 40+ Channels
with current hit films from:*

Paramount Pictures
Columbia Pictures
Sony Pictures Classics
TriStar Pictures
Turner MGM Film Library
Universal Pictures
Touchstone Pictures
Hollywood Pictures
Walt Disney Pictures
Warner Bros
Miramax Films

Pay-Per-View Sports

Up to 40 channels with
events expected from all
major sports leagues

Special Interest

Golf Channel
CBC Newsworld International
Physicians Television Network
Bloomberg Direct Financial
Music Choice (Digital Audio)
TRIO
Movie Preview Channel
Sports Preview Channel
Consumer Information

***List includes all DirecTv programming announced as of June 28, 1994**